

**CONSENT DECREE with  
WESTSIDE INDUSTRIES L.P.,  
WESTSIDE INDUSTRIES GROUP LLC,  
PETER BORGMAN,  
BYRON LAVAN, and  
PETER LOWENTHAL**

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UNITED STATES OF AMERICA,

Plaintiff,

v.

KEY INVESTMENT COMPANY,  
HANCOCK PARTNERSHIP,  
JOHN J. MCKENNA, JR.,  
HIGH MAPLES, INC.,  
HGH, INC.,  
PHILADELPHIA TOBOGGAN,  
WESTSIDE INDUSTRIES L.P.,  
WESTSIDE INDUSTRIES GROUP LLC,  
PETER BORGMAN,  
BYRON LAVAN, and  
PETER LOWENTHAL

Defendants.

Civil Action No.  
98-CV-5162

Hon. Robert F. Kelly

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B. The Parties agree that such complaint is deemed amended to substitute defendant Westside Industries L.P. for defendant Westside Industries and to add defendants Westside Industries Group LLC, Peter Borgman, Byron Lavan, and Peter Lowenthal. The Parties also agree that the allegations made in the complaint are deemed answered.

C. The defendants that have entered into this Consent Decree ("Settling Defendants") do not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the complaint.

D. The United States and Settling Defendants agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

E. For purposes of this Consent Decree, the United States is treating Settling Defendants as peripheral parties at the Site. *See* Memorandum from Barry Breen, Director, Office of Site Remediation and Enforcement, U.S. Environmental Protection Agency, and Bruce S. Gelber, Chief, Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Department of Justice on "Issuance of 'Model CERCLA Peripheral Party Cashout Consent Decree' and 'Model CERCLA Ability to Pay Peripheral Party Cashout Consent Decree'" (January 11, 2001) and "Guidance on Administrative Response Cost Settlements under Section 112(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority" (issued by EPA on September 30, 1998; corrected copy issued December 22, 1998).

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

## **II. JURISDICTION**

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b) and also has personal jurisdiction over Settling Defendants. Settling Defendants consent to and shall not challenge entry of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## **III. PARTIES BOUND**

2. This Consent Decree is binding upon the United States, and upon Settling Defendants and their heirs, successors, assigns, and general partner(s). Any change in ownership or corporate or other legal status, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendants under this Consent Decree.

#### **IV. DEFINITIONS**

3. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

- a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*
- b. "Consent Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, this Consent Decree shall control.
- c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- d. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.
- e. "Effective Date" shall mean the date on which this Consent Decree is entered by the Court.
- f. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.
- g. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.
- h. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.
- i. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.
- j. "Parties" shall mean the United States and the Settling Defendants.
- k. "Plaintiff" shall mean the United States.

l. "RCRA" shall mean the Solid Waste Disposal Act, 42 U.S.C. § 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

m. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

n. "Settling Defendants" shall mean Westside Industries L.P., Westside Industries Group LLC, Peter Borgman, Byron Lavan, and Peter Lowenthal. "Settling Defendants" shall also include the Trust under the Will of Solomon Sultanik dated August 1, 2002.

o. "Site" shall mean the North Penn Area Six Superfund site, encompassing approximately 1,000 acres located in and near the Borough of Lansdale, Montgomery County, Commonwealth of Pennsylvania and generally shown on the map included in Appendix A

p. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

#### **V. STATEMENT OF PURPOSE**

4. By entering into this Consent Decree, the mutual objective of the Parties is for Settling Defendants to make a cash payment, which includes a premium, to address their liability for the Site as provided in the Covenant Not to Sue by Plaintiff in Section VIII, and subject to the Reservations of Rights by United States in Section IX.

#### **VI. PAYMENT OF RESPONSE COSTS**

5. Within 30 days of the Effective Date of this Consent Decree, Settling Defendants shall pay a total of \$83,000.00 to EPA in payment for Past Response Costs.

6. Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number 1999V01060, the EPA Region and Site Spill ID Number 03W9, and DOJ Case Number 90-11-2-06024/2. Payment shall be made in accordance with instructions provided to Settling Defendant by the Financial Litigation Unit of the U.S. Attorney's Office in the Eastern District of Pennsylvania following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. Eastern Time shall be credited on the next business day.

7. At the time of payment, Settling Defendants shall send notice that payment has been made to EPA and DOJ in accordance with Section XV (Notices and Submissions) and to:

Docket Clerk (3RC00)  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia, PA 19103-2029,

and

Barbara Borden (3PM30)  
U.S. EPA Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029.

8. The total amount to be paid pursuant to Paragraph 5 shall be deposited in the North Penn Area Six Superfund Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance any response actions at or in connection with the Site, including EPA's oversight, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

#### **VII. FAILURE TO COMPLY WITH CONSENT DECREE**

9. Interest on Late Payments. If Settling Defendants fail to make any payment under Paragraph 5 by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

10. Stipulated Penalty.

a. If the amount due under Paragraph 5 is not paid by the required due date, Settling Defendants shall be in violation of this Consent Decree and shall pay, as a stipulated penalty, in addition to the interest required by Paragraph 9, \$2,500.00 per violation per day that such payment is late. If Settling Defendants fail to comply with any other obligations of the Consent Decree, Settling Defendants shall be in violation of this Consent Decree and shall pay to EPA, as a stipulated penalty, \$5,000.00 per violation per day of such noncompliance.

b. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of the party making payment, North Penn Area Six Superfund Site, EPA Region III, Site Spill ID Number 03W9, UASO File Number 1999V01060, and DOJ Case Number 90-11-2-06024/2, and shall be sent to:

U.S. Environmental Protection Agency, Region III  
Attention: Superfund Accounting  
P.O. Box 360515  
Pittsburgh, PA 15251-6515

c. At the time of each payment, Settling Defendants shall send notice that payment has been made to EPA and DOJ in accordance with Section XV (Notices and Submissions) and to:

Docket Clerk (3RC00)  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia, PA 19103-2029,

and

Barbara Borden (3PM30)  
U.S. EPA Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029.

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Defendants of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment or performance is due or the day a violation occurs, and shall continue to accrue through the date of payment or the final day of correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

11. If the United States brings an action to enforce this Consent Decree, Settling Defendants shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

12. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of Settling Defendant's failure to comply with the requirements of this Consent Decree. The obligations of Settling Defendants to pay amounts owed the United States under this Consent Decree are joint and several. In the event of the failure of any one or more Settling Defendants to make the payments required under this Consent Decree, the remaining Settling Defendants shall be responsible for such payments.

13. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree.



14. Payment of stipulated penalties shall not excuse Settling Defendants from payment as required by Section VI or from performance of any other requirements of this Consent Decree.

### **VIII. COVENANT NOT TO SUE BY PLAINTIFF**

15. Covenant Not to Sue by United States. Except as specifically provided in Section IX (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), with regard to the Site. With respect to present and future liability, this covenant not to sue shall take effect upon receipt by EPA of the payment required by Section VI (Payment of Response Costs) and any amount due under Section VII (Failure to Comply with Consent Decree). This covenant not to sue is conditioned upon the satisfactory performance by Settling Defendants of its obligations under this Consent Decree. This covenant not to sue extends only to Settling Defendants and does not extend to any other person.

### **IX. RESERVATION OF RIGHTS BY UNITED STATES**

16. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all matters not expressly included within the Covenant Not to Sue by United States in Paragraph 15. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendants with respect to:

a. liability for failure of Settling Defendant to meet a requirement of this Consent Decree;

b. criminal liability;

c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

d. liability, based upon Settling Defendants' ownership or operation of the Site, or upon Settling Defendants' transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Consent Decree by Settling Defendants; and

e. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.

### **X. COVENANT NOT TO SUE BY SETTLING DEFENDANTS**

17. Settling Defendants covenant not to sue and agree not to assert any claims or causes

of action against the United States, or its contractors or employees, with respect to the Site or this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

Except as provided in Paragraph 19 (Waiver of Claims) and Paragraph 23 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 16 (c) - (f), but only to the extent that Settling Defendants' claims arise from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

18. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

19. Settling Defendants agree not to assert any CERCLA claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any other person.

## **XI. EFFECT OF SETTLEMENT / CONTRIBUTION PROTECTION**

20. Except as provided in Paragraph 19, nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Decree may have under applicable law. Except as provided in Paragraph 19, the Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

21. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendants are entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C.

§ 9613(f)(2), for “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person. The “matters addressed” in this Consent Decree do not include those response costs or response actions as to which the United States has reserved its rights under this Consent Decree (except for claims for failure to comply with this Decree), in the event that the United States asserts rights against Settling Defendant coming within the scope of such reservations.

22. Each Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify EPA and DOJ in writing no later than 60 days prior to the initiation of such suit or claim. Each Settling Defendant also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify EPA and DOJ in writing within 10 days of service of the complaint or claim upon it. In addition, each Settling Defendant shall notify EPA and DOJ within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

23. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by Plaintiff set forth in Section VIII.

## **XII. ACCESS AND INSTITUTIONAL CONTROLS**

24. If the Site, or any other property where access and/or land/water use restrictions are needed to implement response activities at the Site, is owned or controlled by any of the Settling Defendants, such owner Settling Defendant(s) shall:

a. commencing on the date of lodging of this Consent Decree, provide the United States and its representatives, including EPA and its contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any response activity related to the Site, including, but not limited to, the following activities:

1. Monitoring, investigation, removal, remedial or other activities at the Site;
2. Verifying any data or information submitted to the United States;

3. Conducting investigations relating to contamination at or near the Site;

4. Obtaining samples;

5. Assessing the need for, planning, or implementing additional response actions at or near the Site;

6. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents, consistent with Section XIII (Access to Information);

7. Assessing Settling Defendants' compliance with this Consent Decree;

and

8. Determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree;

b. commencing on the date of lodging of this Consent Decree, refrain from using the Site, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity or protectiveness of the removal or remedial measures to be performed at the Site; and

c. execute and record in the Recorder of Deeds Office of Montgomery County, Commonwealth of Pennsylvania, an easement, running with the land, that (i) grants a right of access for the purpose of conducting response activities at the Site, and (ii) grants the right to enforce the land/water use restrictions listed in this Paragraph, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the removal or remedial measures to be performed at the Site. Settling Defendants shall grant the access rights and the rights to enforce the land/water use restrictions to the United States, on behalf of EPA, and its representatives, for the length of time necessary to conduct the response action at the Site. Settling Defendants shall, within 45 days of entry of this Consent Decree, submit to EPA for review and approval with respect to such property:

1. a draft easement, in substantially the form attached hereto as Appendix B, that is enforceable under the laws of the Commonwealth of Pennsylvania, free and clear of all prior liens and encumbrances (except as approved by EPA), and acceptable under the Attorney General's Title Regulations promulgated pursuant to 40 U.S.C. § 255; and

2. current title commitment or report prepared in accordance with the U.S. Department of Justice Standards for the Preparation of Title Evidence in Land Acquisitions by the United States (1970) (the "Standards").

Within 15 days of EPA's approval and acceptance of the easement, Settling Defendants shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment or report to affect the title adversely, record the easement with the Recorder of Deeds Office of Montgomery County. Within 30 days of recording the easement, Settling Defendants shall provide EPA with final title evidence acceptable under the Standards, and a certified copy of the original recorded easement showing the clerk's recording stamps.

25. If EPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement response activities at the Site, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendants shall cooperate with EPA's efforts to secure such governmental controls.

26. Notwithstanding any provision of this Consent Decree, the United States retains all of its access authorities and rights, as well as all of its rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.

### **XIII. ACCESS TO INFORMATION**

27. Settling Defendants shall provide to EPA, upon request, copies of all records, reports, or information (hereinafter referred to as "records") within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site.

#### **28. Confidential Business Information and Privileged Documents.**

a. Settling Defendants may assert business confidentiality claims covering part or all of the records submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R.

2.203(b). Records determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies records when they are submitted to EPA, or if EPA has notified Settling Defendants that the records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such records without further notice to Settling Defendants.

b. Settling Defendants may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendants assert such a privilege in lieu of providing records, they shall provide Plaintiff with the following: 1) the title of the record; 2) the date of the record; 3) the name and title of the author

of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. However, no records created or generated pursuant to the requirements of this or any other settlement with the United States shall be withheld on the grounds that they are privileged.

29. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other records evidencing conditions at or around the Site.

#### **XIV. RETENTION OF RECORDS**

30. Until 10 years after the entry of this Consent Decree, Settling Defendants shall preserve and retain all non-identical copies of records and documents now in their possession or control, or which come into their possession or control, that relate in any manner to response actions taken at the Site or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

31. After the conclusion of the document retention period in the preceding paragraph, Settling Defendants shall notify EPA and DOJ at least 90 days prior to the destruction of any such records, and, upon request by EPA or DOJ, Settling Defendants shall deliver any such records to EPA. Settling Defendants may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendants assert such a privilege, they shall provide Plaintiff with the following: 1) the title of the record; 2) the date of the record; 3) the name and title of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. However, no records created or generated pursuant to the requirements of this or any other settlement with the United States shall be withheld on the grounds that they are privileged.

32. Each Settling Defendant hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

#### **XV. NOTICES AND SUBMISSIONS**

33. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United

States, EPA, DOJ, and Settling Defendant, respectively.

As to the United States:

As to DOJ:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice (DJ #90-11-2-06024/2)  
P.O. Box 7611  
Washington, D.C. 20044-7611

As to EPA:

Thomas A. Cinti  
Senior Assistant Regional Counsel (3RC42)  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia, PA 19103

As to Settling Defendant:

Philip L. Hinerman, Esq.  
Fox Rothschild O'Brien & Frankel LLP  
2000 Market Street  
Philadelphia, PA 19103-3291

**XVI. RETENTION OF JURISDICTION**

34. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

**XVII. INTEGRATION/APPENDICES**

35. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendices are attached to and incorporated into this Consent Decree: "Appendix A" is the map of the Site, and "Appendix B" is the Draft Easement.

### **XVIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

36. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

37. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

### **XIX. SIGNATORIES/SERVICE**

38. Each undersigned representative of a Settling Defendant to this Consent Decree and the Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division of the United States Department of Justice certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

39. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Consent Decree.

40. Each Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of the Settling Defendant with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

### **XX. TERMINATION OF UNILATERAL ADMINISTRATIVE ORDER**

41. Upon the Effective Date of this Consent Decree, the Unilateral Administrative Order for access to the Westside Property issued by EPA Region III on July 13, 2005, Docket No. CERC-03-2005-0233-DC, shall terminate. To the extent that Settling Defendants have fulfilled obligations under the Unilateral Administrative Order that are also required by this Consent Decree, Settling Defendants shall be deemed to have fulfilled such obligations under this Consent Decree.



## **XXI. FINAL JUDGMENT**

42. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between the United States and the Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2\_\_\_\_\_.

\_\_\_\_\_  
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Key Investment Co. et al. (Civ. Action No. 98-CV-5162, E.D. Pa.), relating to the North Penn Area Six Superfund Site.

FOR THE UNITED STATES OF AMERICA

KELLY A. JOHNSON  
Acting Assistant Attorney General

9/17/05  
Date

W. BENJAMIN FISHEROW  
Deputy Section Chief  
Environmental Enforcement Section

9/28/05  
Date

CATHERINE MALININ DUNN  
Trial Attorney  
Environmental Enforcement Section  
Environment & Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611

PATRICK L. MEEHAN  
United States Attorney  
Eastern District of Pennsylvania

Date

MARGARET L. HUTCHINSON  
Assistant United States Attorney  
Eastern District of Pennsylvania  
615 Chestnut Street, Suite 1250  
Philadelphia, PA 19106-4476

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Key Investment Co. et al. (Civ. Action No. 98-CV-5162, E.D. Pa.), relating to the North Penn Area Six Superfund Site.

FOR THE UNITED STATES OF AMERICA

KELLY A. JOHNSON  
Acting Assistant Attorney General

\_\_\_\_\_  
Date

\_\_\_\_\_  
W. BENJAMIN FISHEROW  
Deputy Section Chief  
Environmental Enforcement Section

\_\_\_\_\_  
Date

\_\_\_\_\_  
CATHERINE MALININ DUNN  
Trial Attorney  
Environmental Enforcement Section  
Environment & Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611

PATRICK L. MEEHAN  
United States Attorney  
Eastern District of Pennsylvania

9/19/05  
\_\_\_\_\_  
Date

\_\_\_\_\_  
MARGARET L. HUTCHINSON  
Assistant United States Attorney  
Eastern District of Pennsylvania  
615 Chestnut Street, Suite 1250  
Philadelphia, PA 19106-4476

Date: **SEP 21 2005**

---

DONALD S. WELSH  
Regional Administrator, Region III  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia PA 19103-2029

Date: 9/8/05

---

ABRAHAM FERDAS  
Director, Hazardous Site Cleanup Division  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia PA 19103-2029

Date: 9/5/05

---

WILLIAM C. EARLY  
Regional Counsel, Region III  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia PA 19103-2029

Date: 8/30/05

---

ALLISON F. GARDNER  
Assistant Regional Counsel, Region III  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia PA 19103-2029

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Key Investment Co. et al. (Civ. Action No. 98-CV-5162, E.D. Pa.), relating to the North Penn Area Six Superfund Site.

FOR DEFENDANT WESTSIDE INDUSTRIES, L.P.

Date: 8/18/05

/

\_\_\_\_\_

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: PETER H LOWENTHAL

Title: PARTNER

Address: PO BOX 1308

NORTH WALES PA

19454

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Key Investment Co. et al. (Civ. Action No. 98-CV-5162, E.D. Pa.), relating to the North Penn Area Six Superfund Site.

FOR DEFENDANT WESTSIDE INDUSTRIES, LLC

Date: 8.18.05

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: PETER H. LOWENTHAL

Title: PARTNER

Address: PO BOX 1308  
NORTH WALES PA  
19454

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Key Investment Co. et al. (Civ. Action No. 98-CV-5162, E.D. Pa.), relating to the North Penn Area Six Superfund Site.

FOR DEFENDANT PETER BORGMAN

Date: 8-22-05

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: Peter P. Borgman

Title: \_\_\_\_\_

Address: Center & Elm Streets

P. O. Box 1308

North Wales, PA 19454

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Key Investment Co. et al. (Civ. Action No. 98-CV-5162, E.D. Pa.), relating to the North Penn Area Six Superfund Site.

FOR DEFENDANT BYRON LAVAN

Date: 8/20/05 ezm. \_\_\_\_\_

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: Byron R. LaVan

Title: Esquire

Address: 531 Evergreen Lane

Lafayette Hill, PA 19444

\_\_\_\_\_



THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Key Investment Co. et al. (Civ. Action No. 98-CV-5162, E.D. Pa.), relating to the North Penn Area Six Superfund Site.

FOR DEFENDANT PETER LOWENTHAL

Date: 8.18.05

\_\_\_\_\_

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: PETER H. LOWENTHAL

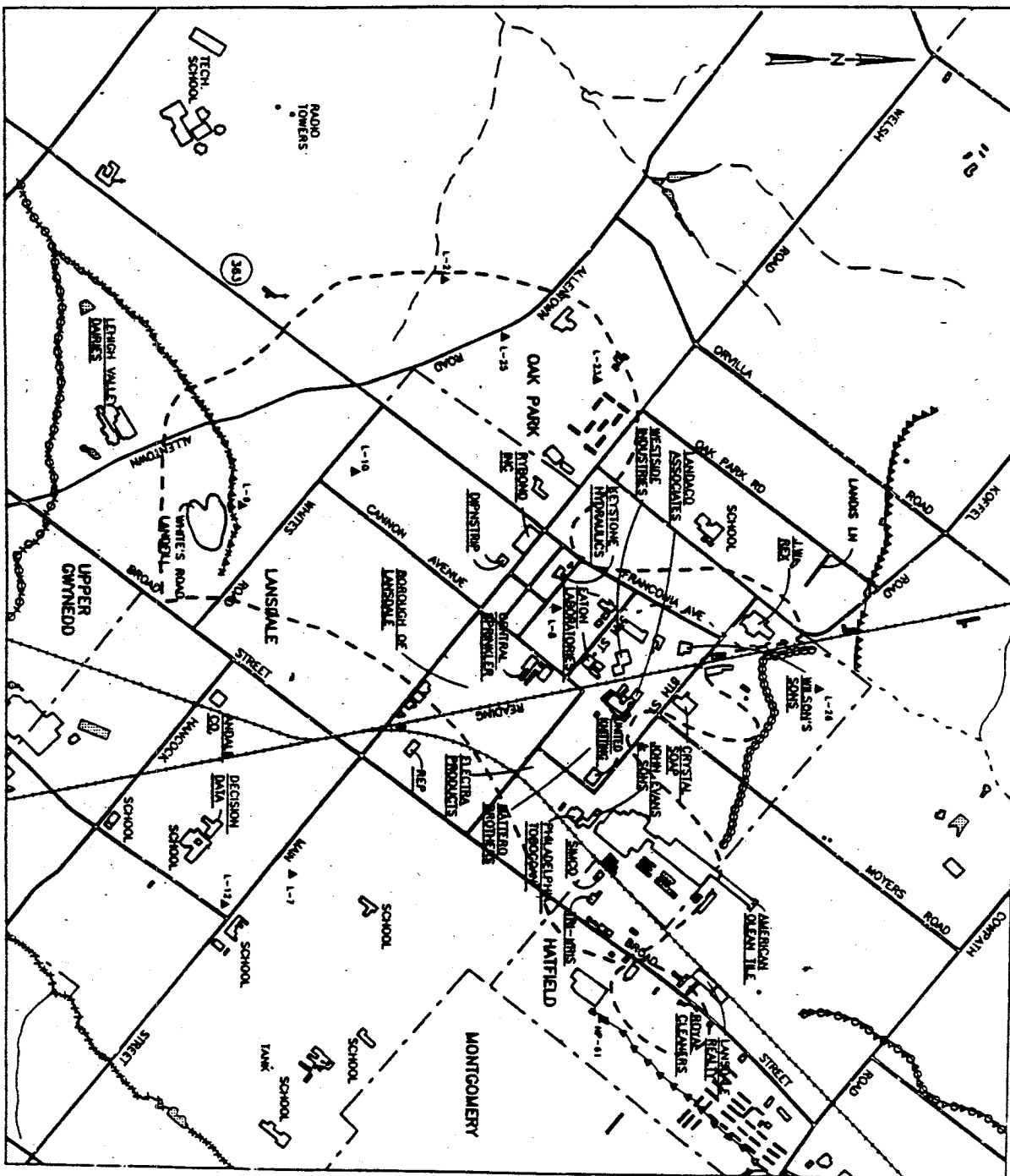
Title: Partner

Address: P. O. Box 1308

North Wales, PA 19454

\_\_\_\_\_

## **APPENDIX A**



## LEGEND

- ```

      ---
      NORTHERN TRIBUTARY TO
      TOWAMENCIN CREEK
      NNNNNNN
      SOUTHERN TRIBUTARY TO
      TOWAMENCIN CREEK
      TOWAMENCIN CREEK
      WISSAWICKON CREEK
      XXXXXXX
      ---
      WEST BRANCH OF NESHAMMY CREEK
      AAAAAAA
      NORTHWESTERN TRIBUTARY TO
      WEST BRANCH OF NESHAMMY CREEK
      6606066
      SOUTHWESTERN TRIBUTARY TO
      WEST BRANCH OF NESHAMMY CREEK
      6606066
      NORTHEASTERN TRIBUTARY TO
      WEST BRANCH OF NESHAMMY CREEK
      6606066
      SOUTHEASTERN TRIBUTARY TO
      WEST BRANCH OF NESHAMMY CREEK
      S-----
      TOWNSHIP AND BOROUGH BOUNDARIES
      OF AREA 6 (MUS. 1966)
      A L-8
      NPWA WELL
  
```

0 750 1500 2250  
SCALE: 1"=1500'

Figure 1-2

MAP OF  
North Penn. Area 6 Site  
Source Control OU RI/FS

**APPENDIX B**

**DRAFT**

**ENVIRONMENTAL PROTECTION EASEMENT  
AND  
DECLARATION OF RESTRICTIVE COVENANTS**

1. This Environmental Protection Easement and Declaration of Restrictive Covenants is made this \_\_\_\_ day of \_\_\_\_\_, 19\_\_, by and between \_\_\_\_\_, ("Grantor"), having an address of \_\_\_\_\_, and, \_\_\_\_\_ ("Grantee"), having an address of \_\_\_\_\_.

WITNESSETH:

2. WHEREAS, Grantor is the owner of a parcel of land located in the county of \_\_\_\_\_, State of \_\_\_\_\_, more particularly described on **Exhibit A** attached hereto and made a part hereof (the "Property"); and

3. WHEREAS, the Property is part of the \_\_\_\_\_ Superfund Site ("Site"), which the U.S. Environmental Protection Agency ("EPA"), pursuant to Section 105 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9605, placed on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on \_\_\_\_\_, 19\_\_; and

4. WHEREAS, in a Record of Decision dated \_\_\_\_\_, 19\_\_ (the "ROD"), the EPA Region \_\_ Regional Administrator selected a "remedial action" for the Site, which provides, in part, for the following actions:

and .

5. WHEREAS, with the exception of \_\_\_\_\_  
\_\_\_\_\_, the remedial action has been implemented at the Site; and

6. WHEREAS, the parties hereto have agreed 1) to grant a permanent right of access over the Property to the Grantee for purposes of implementing, facilitating and monitoring the remedial action; and 2) to impose on the Property use restrictions as covenants that will run with the land for the purpose of protecting human health and the environment; and

7. WHEREAS, Grantor wishes to cooperate fully with the Grantee in the implementation of all response actions at the Site;

NOW, THEREFORE:

8. Grant: Grantor, on behalf of itself, its successors and assigns, in consideration of [the terms of the Consent Decree in the case of \_\_\_\_\_ v. \_\_\_\_\_, etc.], does hereby covenant and declare that the Property shall be subject to the restrictions on use set forth below, and does give, grant and convey to the Grantee, and its assigns, with general warranties of title, 1) the perpetual right to enforce said use restrictions, and 2) an environmental protection easement of the nature and character, and for the purposes hereinafter set forth, with respect to the Property.

9. Purpose: It is the purpose of this instrument to convey to the Grantee real property rights, which will run with the land, to facilitate the remediation of past environmental contamination and to protect human health and the environment by reducing the risk of exposure to contaminants.

10. Restrictions on use: The following covenants, conditions, and restrictions apply to the use of the Property, run with the land and are binding on the Grantor:

11. Modification of restrictions: The above restrictions may be modified, or terminated in whole or in part, in writing, by the Grantee. If requested by the Grantor, such writing will be executed by Grantee in recordable form.

12. Environmental Protection Easement: Grantor hereby grants to the Grantee an irrevocable, permanent and continuing right of access at all reasonable times to the Property for purposes of:

- a) Implementing the response actions in the ROD, including but not limited to \_\_\_\_\_;
  - b) Verifying any data or information submitted to EPA.
  - c) Verifying that no action is being taken on the Property in violation of the terms of this instrument or of any federal or state environmental laws or regulations;
  - d) Monitoring response actions on the Site and conducting investigations relating to contamination on or near the Site, including, without limitation, sampling of air, water, sediments, soils, and specifically, without limitation, obtaining split or duplicate samples;
  - e) Conducting periodic reviews of the remedial action, including but not limited to, reviews required by applicable statutes and/or regulations; and
  - f) Implementing additional or new response actions if the Grantee, in its sole discretion, determines i) that such actions are necessary to protect the environment because either the original remedial action has proven to be ineffective or because new technology has been developed which will accomplish the purposes of the remedial action in a significantly more efficient or cost effective manner; and, ii) that the additional or new response actions will not impose any significantly greater burden on the Property or unduly interfere with the then existing uses of the Property.
13. Reserved rights of Grantor: Grantor hereby reserves unto itself, its successors, and assigns, all rights and privileges in and to the use of the Property which are not incompatible with the restrictions, rights and easements granted herein.
14. Nothing in this document shall limit or otherwise affect EPA's rights of entry and access or EPA's authority to take response actions under CERCLA, the NCP, or other federal law.
15. No Public Access and Use: No right of access or use by the general public to any portion of the Property is conveyed by this instrument.
16. Notice requirement: Grantor agrees to include in any instrument conveying any interest in any portion of the Property, including but not limited to deeds, leases and mortgages, a notice which is in substantially the following form:

**NOTICE: THE INTEREST CONVEYED HEREBY IS  
SUBJECT TO AN ENVIRONMENTAL PROTECTION  
EASEMENT AND DECLARATION OF RESTRICTIVE  
COVENANTS, DATED \_\_\_\_\_, 19\_\_, RECORDED IN  
THE PUBLIC LAND RECORDS ON \_\_\_\_\_, 19\_\_, IN**

**BOOK \_\_\_\_\_, PAGE \_\_\_\_\_, IN FAVOR OF, AND  
ENFORCEABLE BY, THE UNITED STATES OF  
AMERICA.**

Within thirty (30) days of the date any such instrument of conveyance is executed, Grantor must provide Grantee with a certified true copy of said instrument and, if it has been recorded in the public land records, its recording reference.

17. Administrative jurisdiction: The federal agency having administrative jurisdiction over the interests acquired by the United States by this instrument is the EPA.

18. Enforcement: The Grantee shall be entitled to enforce the terms of this instrument by resort to specific performance or legal process. All remedies available hereunder shall be in addition to any and all other remedies at law or in equity, including CERCLA. Enforcement of the terms of this instrument shall be at the discretion of the Grantee, and any forbearance, delay or omission to exercise its rights under this instrument in the event of a breach of any term of this instrument shall not be deemed to be a waiver by the Grantee of such term or of any subsequent breach of the same or any other term, or of any of the rights of the Grantee under this instrument.

19. Damages: Grantee shall be entitled to recover damages for violations of the terms of this instrument, or for any injury to the remedial action, to the public or to the environment protected by this instrument.

20. Waiver of certain defenses: Grantor hereby waives any defense of laches, estoppel, or prescription.

21. Covenants: Grantor hereby covenants to and with the United States and its assigns, that the Grantor is lawfully seized in fee simple of the Property, that the Grantor has a good and lawful right and power to sell and convey it or any interest therein, that the Property is free and clear of encumbrances, except those noted on **Exhibit D** attached hereto, and that the Grantor will forever warrant and defend the title thereto and the quiet possession thereof.

22. Notices: Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and shall either be served personally or sent by first class mail, postage prepaid, addressed as follows:

To Grantor:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

To Grantee:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



23. General provisions:

a) Controlling law: The interpretation and performance of this instrument shall be governed by the laws of the United States or, if there are no applicable federal laws, by the law of the state where the Property is located.

b) Liberal construction: Any general rule of construction to the contrary notwithstanding, this instrument shall be liberally construed in favor of the grant to effect the purpose of this instrument and the policy and purpose of CERCLA. If any provision of this instrument is found to be ambiguous, an interpretation consistent with the purpose of this instrument that would render the provision valid shall be favored over any interpretation that would render it invalid.

c) Severability: If any provision of this instrument, or the application of it to any person or circumstance, is found to be invalid, the remainder of the provisions of this instrument, or the application of such provisions to persons or circumstances other than those to which it is found to be invalid, as the case may be, shall not be affected thereby.

d) Entire Agreement: This instrument sets forth the entire agreement of the parties with respect to rights and restrictions created hereby, and supersedes all prior discussions, negotiations, understandings, or agreements relating thereto, all of which are merged herein.

e) No Forfeiture: Nothing contained herein will result in a forfeiture or reversion of Grantor's title in any respect.

f) Joint Obligation: If there are two or more parties identified as Grantor herein, the obligations imposed by this instrument upon them shall be joint and several.

g) Successors: The covenants, terms, conditions, and restrictions of this instrument shall be binding upon, and inure to the benefit of, the parties hereto and their respective personal representatives, heirs, successors, and assigns and shall continue as a servitude running in perpetuity with the Property. The term "Grantor", wherever used herein, and any pronouns used in place thereof, shall include the persons and/or entities named at the beginning of this document, identified as "Grantor" and their personal representatives, heirs, successors, and assigns. The term "Grantee", wherever used herein, and any pronouns used in place thereof, shall include the persons and/or entities named at the beginning of this document, identified as "Grantee" and their personal representatives, heirs, successors, and assigns. The rights of the Grantee and Grantor under this instrument are freely assignable, subject to the notice provisions hereof.

h) Termination of Rights and Obligations: A party's rights and obligations under this instrument terminate upon transfer of the party's interest in the Easement or Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

This easement is accepted this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

**DRAFT**

UNITED STATES OF AMERICA

the persons and/or entities named at the beginning of this document, identified as "Grantor" and their personal representatives, heirs, successors, and assigns.

U.S. ENVIRONMENTAL PROTECTION  
AGENCY

By: \_\_\_\_\_  
\_\_\_\_\_

|              |           |   |                                                                          |
|--------------|-----------|---|--------------------------------------------------------------------------|
| Attachments: | Exhibit A | - | legal description of the Property                                        |
|              | Exhibit B | - | identification of proposed uses and construction plans, for the Property |
|              | Exhibit C | - | identification of existing uses of the Property                          |
|              | Exhibit D | - | list of permitted title encumbrances                                     |